Supreme Court, U.S.
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No. 86-1208

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

IAN C. CHAPPELL,
Petitioner,

v.

GTE PRODUCTS CORPORATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Dated: February 11, 1987

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QUESTION PRESENTED

Did the Court of Appeals correctly apply the standards of proof under the Age Discrimination in Employment Act to the facts in this case?

LIST OF CORPORATE AFFILIATES AND SUBSIDIARIES

GTE CORPORATION

GTE SERVICE CORPORATION

GTE COMMUNICATIONS SERVICES INCORPORATED

GTE SPRINT COMMUNICATIONS CORPORATION

GTE SPACENET CORPORATION

GTE PRODUCTS OF CONNECTICUT CORPORATION

GTE COMMUNICATIONS SYSTEMS CORPORATION

GTE GOVERNMENT SYSTEMS CORPORATION

GTE INTERNATIONAL INCORPORATED

- GTE del Peru S.A.
- GTE Electronica, S.A.
- GTE Industries Incorporated
- GTE Sylvania, S.A. de C.V.
- GTE Sylvania S.A. Electronica, Quimica, Industrial y Commercial
- GTE Taiwan Communication Systems Ltd.
- GTE UK Holdings Ltd.
- Rotaflex p.l.c.
- Kondo Sylvania Limited

GTE PRODUCTS CORPORATION (Delaware)*

GTE VALERON CORPORATION

GTE LABORATORIES INCORPORATED

GENERAL TELEPHONE COMPANY OF CALIFORNIA

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* Respondent in this case.

GENERAL TELEPHONE COMPANY OF FLORIDA

GENERAL TELEPHONE COMPANY OF THE SOUTH

GENERAL TELEPHONE COMPANY OF THE SOUTHWEST

GENERAL TELEPHONE COMPANY OF ILLINOIS

GENERAL TELEPHONE COMPANY OF INDIANA, INC.

GENERAL TELEPHONE COMPANY OF MICHIGAN

GENERAL TELEPHONE COMPANY OF THE MIDWEST

GENERAL TELEPHONE COMPANY OF OHIO

GENERAL TELEPHONE COMPANY OF PENNSYLVANIA

GENERAL TELEPHONE COMPANY OF WISCONSIN

GENERAL TELEPHONE COMPANY OF ALASKA

GENERAL TELEPHONE COMPANY OF THE NORTHWEST, INC.

HAWAIIAN TELEPHONE COMPANY

GARRETT TELEPHONE CO., INC.

GTE TELECOM MARKETING CORPORATION

LA COMPAGNIE DE TELEPHONE ANGLO-CANADIENE/ANGLO CANADIAN TELEPHONE COMPANY

British Columbia Telephone Company

Quebec-Telephone

GTE DATA SERVICES INCORPORATED

GTE DIRECTORIES CORPORATION

GTE MOBILNET INCORORATED

Cellular Communications Corporation

GTE TELECOM INCORPORATED

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent GTE Products Corporation ("GTE") asks this Court to deny the petition for a writ of certiorari seeking review of the judgment of the United States Court of Appeals for the Sixth Circuit.[1]

COUNTERSTATEMENT

The decision below upholds the district court's grant of a judgment notwithstanding the verdict. That action overturned a finding that petitioner Ian Chappell had been discriminated against by GTE in violation of the

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[1] Respondent was not timely served with a notice of filing as required by Rule 19.3, but understands that the petition was filed on January 6, 1987. However, respondent did not receive the petition until January 12, 1987.

Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.* (1982) ("ADEA"). In his appeal to the Sixth Circuit, petitioner attacked the district court's application of Rule 50(b) of the Federal Rules of Civil Procedure, but not its interpretation of the ADEA. In this Court, however, petitioner has changed course and focuses only on the Sixth Circuit's discussion of an ADEA prima facie case.

Because of petitioner's concern with the Sixth Circuit's application of the ADEA to the facts in this case, he has provided a long case chronology. That chronology is, however, selective and incorrect. A counterstatement follows.

A. Petitioner's Performance with GTE

Petitioner was hired by GTE in 1952. In 1969, he began work at the company's Winchester, Kentucky manufacturing plant as a senior engineer. The Winchester facility makes industrial and commercial lighting products. *Chappell v. GTE Products Corporation* 803 F.2d 261, 263-64 (6th Cir. 1986), *reprinted at* Pet. App. at 1A, 2A.[2]

GTE began formally evaluating employees' work at the Winchester plant in 1975. From then until his transfer to another job, petitioner's performance was erratic. In 1975, he was rated "competent" (a mid-level rating), largely because of design work on lamps that later proved unmarketable because of design flaws. By 1977, his performance had fallen to "unacceptable," and, in 1978, it was "provisional," the next to lowest rating. In 1979, management found a slight improvement in petitioner's demonstrated "lack of self-motivation." How-

[2] The petition for writ of certiorari will be cited as "Pet. at ——." The petitioner's appendix will be cited as "Pet. App. at ——." Plaintiff's trial exhibits are cited as "PX ——," Defendant's as "DX ——". The trial transcript, which is in four volumes, is cited by volume and page number, as, for example, "Tr. II at ——".

ever, his work was rated acceptable in 1980 only after his workload was reduced. (Tr. II at 113-21, 134-37; Tr. IV at 6-8; DX-4; PX-9, 10, 11, and 12)

B. Decline in Business and Petitioner's Transfer

From 1979 to 1980, net income from the Winchester facility fell more than 40%. This forced a major reduction in salaried employees in July 1980. 803 F.2d at 264, Pet. App. at 2A. Petitioner's engineer position was eliminated and, given his past performance, he was slated for layoff. Instead, however, management transferred him to a production technician job, while laying off two incumbent technicians who were under age 30. (Tr. II at 17-18) Though petitioner's new position had a lower salary grade, management continued to pay him the same salary he had received as an engineer. *Id.*[3] As a production technician, petitioner worked mostly in the plant's Parabolic Aluminized Reflector ("PAR") engineering section. *Id.*

From the time he entered the PAR section, petitioner's job performance was marginal. His supervisors, all of whom were over 40 years old, met with him regularly to discuss his performance deficiencies. Their appraisals were generally critical. In May 1981, petitioner's merit pay increase was delayed because he had not improved his performance. (Tr. II at 102-05). On November 30, 1981, his performance was formally rated "unsatisfactory." (PX-6; Tr. II at 74-86; Tr. III at 63-68). In the following year, petitioner's performance improved slightly, but his work was still rated between unsatisfactory and provisional. (Tr. II at 88-90; Tr. III at 70-71; DX-2).

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[3] Petitioner's claim that "No justification was ever given by the defendant at trial . . ." for his transfer (Pet. at 5) is clearly false. There was ample evidence on this point. *See* Tr. II at 17-18; Tr. III at 145-46, 159-61.

C. Further Business Decline and Additional Layoffs

After 1980, business continued to decline at the Winchester plant. Net income fell another 20% in 1981 and, in 1982, the plant experienced its first loss—$2.6 million. These business reversals required salaried work force reductions of 5% in February 1981, 5% in November 1981, and 10% in November 1982. 803 F.2d at 264; Pet. App. at 2A. None of these layoffs adversely affected employees over age 40; in fact, as the layoffs progressed, the proportion of salaried employees over age 40 in the Winchester work force steadily increased from 48% to 63%.[4]

D. Selection of Petitioner for Layoff

To implement the 1982 work force reduction, GTE mandated that department heads at the Winchester plant reduce their salaried staffs by 10%. For petitioner's department head, this meant identifying three positions which could be eliminated with the least impact on department operations. The jobs he concluded were dispensable were specification clerk, project engineer, and production technician. 803 F.2d at 264, App. at 2A; Op., Pet. App. at 10B-13B.

Petitioner was one of three production technicians. Each had about 25 years' service with GTE, and each was over 40. Petitioner, however, had significantly inferior performance evaluations and was therefore chosen for layoff. 803 F.2d at 264, Pet. App. at 3A.[5]

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[4] District court opinion ("Op."), *reprinted at* Pet. App. at 10B; 803 F.2d at 268, Pet. App. at 10A. In addition, though 59% of the Winchester salaried workforce was over age 40 just before the November 1982 layoff, they constituted only 27% of those laid off. Op., Pet. App. at 23B-24B; 803 F.2d at 268, Pet. App. at 10A.

[5] The two other employees laid off in petitioner's department were 32 and 34 years old. Tr. II at 139-40; Tr. III at 141-42; Tr. IV at 10-12.

E. Reassignment of Jo Ann Miller

The Winchester plant was shut down for two weeks following the November 1982 layoff. During this period, management concluded that production efficiency required consolidation of the packing and manufacturing operations. A by-product of this change was the elimination of a production supervisor's job held by Jo Ann Miller, who was 41 years old and had worked at the plant for 18 years. 803 F.2d at 264, Pet. App. at 3A.

Because the plant had already met its 10% reduction target, and because Ms. Miller had been a consistently superior employee, management sought to retain her. She had worked for ten years in positions which had given her a detailed knowledge of PAR operations (Tr. III at 75-78, 83-87), and was therefore offered a job as a production technician in the reorganized PAR section. After a short transition period, she began full time work in that position in early 1983. 803 F.2d at 264, Pet. App. at 3A.

F. The Trial and Appeal

Petitioner challenged his layoff in a complaint filed June 29, 1983. A four-day trial was held in December 1984. To explain its layoff decisions, GTE offered evidence on the economic reasons for its work force reductions, the impact of those reductions on older workers, and the reasons petitioner was selected for layoff. Op., App. at 8B-14B.

Petitioner claimed that four kinds of evidence showed GTE's business justifications were pretexts for discrimination. His pretext evidence was the following:

—Petitioner offered his own "lay opinion" on "statistics" he devised purporting to show that older workers had been disfavored by GTE. (Pet. at 12). These statistics treated anyone who left the plant—even for a better job—as having been "demoted," and determined the age of employees

in the study from the "environment" and conjecture. 803 F.2d at 268, Pet. App. at 9A-10A.

—Petitioner pointed to the fact that Jo Ann Miller had been placed in a production technician job shortly after his layoff. Pet. at 9-10; 803 F.2d at 267-68, Pet. App. at 8A-9A.

—Petitioner noted that when he worked in the PAR operation, "shrinkage" (*i.e.*, loss or spoilage of bulbs) was low. 803 F.2d 266-67, n.1, Pet. App. at 7A.

—Petitioner noted that in mid-1984 he applied, but was not hired, for a Senior Industrial Engineer position at the plant. Pet. at 10-11; 803 F.2d at 267, n.1, Pet. App. at 7A.[6]

On the last day of trial, the jury returned a finding of willful age discrimination.

GTE filed a motion for a judgment notwithstanding the verdict. On April 5, 1985, the district court granted that motion. Pet. App. at 1B-31B. It held that petitioner had established a prima facie case, but that he had introduced no evidence to sustain a jury finding that GTE's business justifications were pretextual. Pet. App. 6B, 10B, 14B. In particular, the court found (1) that petitioner's statistics were defective and entitled to no weight. *Id.* at 23B; (2) that the transfer of Jo Ann Miller by itself did not show that GTE's reasons for laying off petitioner were untrue. *Id.* at 17B-22B; (3) that, since "shrinkage" figures were the product of 150 employees' efforts (including the labors of those on the two shifts which petitioner did not work) and mechanical innovations, they involved too many variables to have

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[6] Petitioner also mentions evidence excluded by the trial judge which he says is in the record "by way of avowel" [sic]. Pet. at 12-13. The court of appeals affirmed the district court's exclusion of this material, and the petition does not challenge that action. 803 F.2d at 268, n.2, Pet. App. at 11A. The irrelevant testimony petitioner alludes to is thus simply not in the record.

any bearing on management's appraisal of his performance. *Id.* at 24B-25B; and (4) that evidence concerning a job opening that occurred two years after petitioner's layoff, and that was never filled, could not reasonably support a finding of pretext. *Id.* 25B-26B.

On appeal, petitioner attacked only the district court's application of Rule 50(b). See petitioner's Sixth Circuit Brief at 1. On October 14, 1986, the Sixth Circuit issued an opinion affirming the trial court's decision in all respects. Pet. App. at 1A-11A. In doing so, the Sixth Circuit carefully reviewed the evidence bearing on petitioner's four pretext arguments. In each case, it concluded—as had the district court—that there was nothing to justify a conclusion that GTE's explanations were not the true reasons for petitioner's layoff. 803 F.2d 266-68, Pet. App. at 7A-11A

REASONS FOR DENYING THE WRIT

This case does not present a conflict among the circuits on the standards for proving or rebutting a claim under the ADEA. There is not even a conflict between what petitioner says is the standard for proof of "pretext" under the ADEA, and what the Sixth Circuit in this case held on that point. In reality, petitioner's grievance concerns the weight of the evidence, not the formulation of legal rules. Such an evidentiary question is not, however, raised in his petition, and, if it had been, would not justify review by this Court.

ARGUMENT

I. The Sixth Circuit Did Not Employ The Legal Standard That Petitioner Claims.

In the last fifteen years, this Court has fully and frequently explored the standards of proof in employment discrimination cases. Beginning with *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and in subsequent cases,[7] the Court has adopted a three-step process for proof of disparate treatment in Title VII cases: First, the plaintiff, who at all times has the ultimate burden of proof, must make a prima facie showing of discrimination. *Burdine*, 450 U.S. at 252-53. Next, the defendant is entitled to rebut the presumption created by a prima facie case by offering legitimate non-discriminatory business reasons for its conduct. *Aikens*, 460 U.S. at 714-15. After such evidence is offered, the presumption created by a prima facie showing "drops from the case," [8] *Burdine*, 450 U.S. at 255 n.10, and "the factual inquiry proceeds to a new level of specificity." *Id.* at 255. Part of this "new level of specificity" is attempted proof by the plaintiff that the defendant's proffered explanations are "not its true reasons but . . . a pretext for discrimination." *Burdine*, 450 U.S. at 253.[9]

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[7] United States Postal Service Board of Gov ors v. Aikens, 460 U.S. 711 (1983); Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981); Board of Trustees v. Sweeney, 439 U.S. 24 (1978); Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978); International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977).

[8] Petitioner is wrong to say that "once petitioner has established his prima facie case he goes into the arena armed with certain presumptions that require no further proof . . ." Pet. at 21-22. In fact, under *Burdine*, those presumptions "drop[ped] from the case" when GTE articulated nondiscriminatory business reasons for the layoff.

[9] These general standards have been adopted by all the circuits in ADEA cases. See Section II, infra. See also Trans World Airlines Inc. v. Thurston, 469 U.S. 111, 121 (1985).

It is the Sixth Circuit's treatment of pretext proof that petitioner attacks. According to petitioner, the lower court wrongly held that he could show pretext only by directly proving that GTE was motivated by age-based animus. Pet. at 17-20. This supposed holding was wrong, petitioner says, because this Court has held that a plaintiff may also show pretext indirectly, by proving that "the employer's proffered explanation is unworthy of credence." *Burdine*, 450 U.S. at 256, citing *McDonnell Douglas*, 411 U.S. at 804-05.[10]

It is impossible to understand how petitioner can make such an argument. This is what the Sixth Circuit said in this case about how pretext may be proven:

> Three ways in which *a plaintiff can establish that defendant's reasons for laying off the plaintiff were not credible* are: (1) *by showing the reasons had no basis in fact*, (2) if they have a basis in fact, by showing they were not the actual factors motivating the discharge, *or* (3) if they were factors, by showing that they were jointly insufficient to motivate the discharge.[11]

Thus, while petitioner says he was denied an opportunity to show that GTE's business reasons were "unworthy of credence," Pet. at 18, the Sixth Circuit in this case recognized that one way he could show pretext was to "establish that [those] reasons are not credible." There is simply no difference between those positions, much

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[10] *See Aikens*, 460 U.S. at 717-18 (Blackmun, J., concurring.)

[11] 803 F.2d at 266, Pet. App. at 7A, citing La Montagne v. American Convenience Products Inc., 750 F.2d 1405, 1414-15 (7th Cir. 1984) (emphasis supplied). The district court in this case relied on precisely the same standard, but petitioner did not claim that was error in his appeal to the Sixth Circuit. Op., Pet. App. at 14B-15B. *See also* West v. Fred Wright Construction Co. 756 F.2d 31 (6th Cir. 1985) (quoting and relying on *Burdine's* discussion of direct and indirect methods of showing pretext.)

less a difference significant enough to warrant review by this Court.[12]

The Sixth Circuit did not merely state the correct standard for proof of pretext. It also applied that standard carefully and properly. As had the district court, it examined the evidence bearing on each of petitioner's pretext claims: It first concluded that petitioner's statistics were "Mere . . . speculation" and could "carry no weight." 803 F.2d at 268, Pet. App. at 9A-10A. Similarly, it found that "shrinkage" figures had so little to do with petitioner individually that they showed nothing relevant. 803 F.2d at 266-67, n.1, Pet. App. at 7A. As to Jo Ann Miller's transfer, the Sixth Circuit observed that the fact that Miller was younger than petitioner "does not reveal that [her] . . . transfer . . . was not based on legitimate business concerns." 803 F.2d at 268, Pet. App. at 9A. Finally, it indicated that no weight could be given to the fact that GTE failed to hire petitioner for a job that was never filled. 803 F.2d at 267 n.1, Pet. App. at 7A.

The plain fact is that petitioner received both a proper statement, and proper application, of the legal standard he advocates. What he did not have was the evidence to justify a jury verdict based on that standard.

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[12] Petitioner's claim of error is also apparently based on occasions when the Sixth Circuit has said that there must be "evidence of discriminatory purpose." Pet. at 20-21, quoting Wilkins v. Eaton Corp., 790 F.2d 515, 523 (6th Cir. 1986). *See also* Pet. at 16-17. Read in context, however, these Sixth Circuit statements are not restrictions on how to show pretext, but are instead references to a plaintiff's ultimate burden of proof in a disparate treatment case. The paragraph in *Wilkens* which petitioner cites does not concern pretext proof and begins by saying "The plaintiff has the burden of establishing by a preponderance of the evidence that age was a determining factor in his discharge." 790 F.2d at 523. This Court has described a plaintiff's Title VII burden in comparable terms. *Burdine*, 450 U.S. at 253.

II. The Standard The Sixth Circuit Did Use Is Consistent With The Law In Other Circuits And With Decisions Of This Court.

Petitioner's claim that the opinion below illustrates "Conflicts Among the Lower Courts," Pet. at 17, as to ADEA proof standards is wrong.[13] In fact, the circuits take a generally uniform approach to the standards of proof under the ADEA. Every circuit — including the Sixth—has adapted the *McDonnell-Douglas/Burdine* proof process to age discrimination cases.[14] Most quote directly from this Court's decisions in *McDonnell-Douglas*, *Furnco*, *Burdine*, and *Aikens*. Most of those circuits—again including the Sixth—have recognized both the "direct" and "indirect" methods of showing pretext.[15] There is abso-

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[13] Remarkably, petitioner's first example of circuit conflict is a *dissenting* opinion. Lewis v. University of Pittsburgh, 725 F.2d 910, 925 (3rd Cir.), *cert. denied*, 469 U.S. 892 (1984). Moreover, a Third Circuit ADEA case that petitioner cites, Duffy v. Wheeling Pittsburgh Steel Corp., 738 F.2d 1393 (3rd Cir.), *cert. denied*, 469 U.S. 1087 (1984), contains a discussion of ADEA burdens of proof and production (including those for pretext) virtually identical to the Sixth Circuit's approach in this case.

[14] *See, e.g.*, Loeb v. Textron, Inc., 600 F.2d 1003 (1st Cir. 1979); Hagelthorn v. Kennecott Corp., 710 F.2d 76, 80-82 (2d Cir. 1983); Duffy v. Wheeling Pittsburgh Steel Corp., 738 F.2d at 1395-96 (3rd Cir. 1984); EEOC v. Western Electric, 713 F.2d 1011, 1014 (4th Cir. 1983); Thornbrough v. Columbus & Greenville R.R. Co., 760 F.2d 633, 638-40 (5th Cir. 1985); Blackwell v. Sun Electric Corp., 696 F.2d 1176 (6th Cir. 1983); LaMontagne v. American Convenience Products, 750 F.2d at 1409-10, 1414-15 (7th Cir. 1984); Holley v. Sanyo Mfg. Co., 771 F.2d 1161, 1164-65 (8th Cir. 1985); Foster v. Arcata Assocs., 772 F.2d 1453 (9th Cir. 1985), *cert. denied*, 106 S. Ct. 1267 (1986); Schwager v. Sun Oil Co., 591 F.2d 58 (10th Cir. 1979); Horn v. Bibb County Commission, 713 F.2d 689, 691 (11th Cir. 1983); Coburn v. Pan American World Airways, 711 F.2d 339, 342 (D.C. Cir.), *cert. denied*, 464 U.S. 994 (1983).

[15] *See, e.g.*, White v. Vathally 732 F.2d 1037, 1042-3 (1st Cir.), *cert. denied*, 469 U.S. 933 (1984); *Hagelthorn*, 710 F.2d at 81-83; *Duffy*, 738 F.2d at 1396; Lovelace v. Sherwin-Williams Co., 681

lutely no disagreement among the circuits about the basic standards for proof of an age discrimination case.[16] The only way petitioner can say this case exemplifies circuit conflict is by ignoring what the Sixth Circuit actually held.

III. This Case Does Not Involve Any Significant Question Of Law.

The extent to which petitioner has gone to invent circuit conflict is eloquent testimony to the fact that this case does not involve questions appropriate for review in this Court. Throughout, the main difference between the parties has not been the law, but the weight of the evidence. In the court below, petitioner argued that there was enough evidence to justify a jury finding in his favor. That factual argument is essentially repeated in his petition. Pet. at 4-14. However, after carefully reviewing the evidence and after applying the proper standard for pretext, two federal courts have concluded that "[t]he record in this case is devoid of evidence permitting an inference that age was a determining factor in Chappell's layoff." 803 F.2d at 268, Pet. App. at 10A-11A.

F.2d 230, 239-41 (4th Cir. 1982); *Thornbrough*, 760 F.2d at 646-47; *West v. Fred Wright Const Co.*; *La Montagne*, 750 F.2d at 1409-10, 1414-15; Sakellar v. Lockheed Missiles & Space Co., 765 F.2d 1453, 1455 (9th Cir. 1985), *cert. denied*, 106 S. Ct. 856 (1986); *Horn*, 713 F.2d at 691.

[16] ADEA cases can involve unique policy considerations and circumstances. *See* Matthews v. Allis Chalmers, 769 F.2d 1215, 1219-24 (7th Cir. 1985) (concurring opinion); Marshall v. Goodyear Tire & Rubber Co., 554 F.2d 730, 736 (5th Cir. 1977). *Cf.* Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 313-14 (1976). Mindful of this Court's admonition in *Furnco* that *McDonnell-Douglas* is not to be mechanically applied, 438 U.S. at 577, courts have sometimes had to modify proof procedures in age discrimination cases. *See Matthews, supra*; *Marshall, supra*; Blackwell v. Sun Electric Corp., 696 F.2d 1176 (6th Cir. 1983). No such adaptation is present here, however.

The Sixth Circuit and the district court were right. The lower courts' weighing of the evidence is, however, not challenged in the petition, and, if it were, would not be an appropriate question for review.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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Dated: February 11, 1987